Case No. SC-2022-0719

IN THE SUPREME COURT OF ALABAMA

SPRINGHILL HOSPITALS, INC.,
D/B/A SPRINGHILL MEMORIAL HOSPITAL,

Appellant,

v.

PATRICIA BILBREY WEST, AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN DEWEY WEST, JR.,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
CIVIL ACTION NO. CV-2016-901045

AMICUS CURIAE BRIEF OF THE ALABAMA CIVIL JUSTICE REFORM COMMITTEE IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

The Alabama Civil Justice Reform Committee ("ACJRC") is a statewide trade association formed in 1985 and representing more than 60 trade associations and businesses. ACJRC was the principal proponent of the 1987 tort reform measures adopted by the Alabama legislature that year. One of those Acts, a cap on the amount of punitive damages allowed in a medical liability wrongful death action, is directly implicated in this appeal.

ACJRC continues to exist solely to promote and foster a stable and balanced civil justice system in Alabama. It has appeared in judicial proceedings to encourage decisions designed to promote those goals, and each year develops a legislative agenda on civil justice reform.

ACJRC submits this brief because the 1995 decision which invalidated Section 6-5-547, *Smith v. Schulte*, 671 So.2d 1334 (Ala. 1995), has been acknowledged by a majority of this Court, on numerous occasions, to have been wrongfully decided, based on faulty reasoning, and no longer entitled to precedential value. But this Court has not yet had occasion to revive and apply the cap in a case when this issue has

been properly presented. This case presents an historic opportunity to correct an acknowledged mistake and the cap should be revived and applied in this action and in all future wrongful death medical liability cases. ACJRC respectfully urges the Court to apply the cap the legislature established decades ago but which has been wrongfully withheld for over two decades.

FACTS

ACJRC accepts the Statement of Facts as set forth by the Appellant.

SUMMARY OF ARGUMENT

A majority of the Court has rejected the reasoning of the 1995 *Smith v. Schulte* decision in several subsequent decisions. The Court has now been asked to formally overrule this precedent and restore the cap on punitive damages in wrongful death medical liability actions that the legislature approved in 1987. Revival of the cap is the appropriate course. Other 1987 tort reform statutes erroneously invalidated by a prior Court have been restored by more recent decisions of this Court and are routinely applied today in trial and appellate courts, as they should be. The cap authorized by the

legislature in 1987 is applicable to this case and ACJRC urges the Court to apply it.

INTRODUCTION

Acting through their elected representatives, Alabama's citizens determined that wrongful-death damages in medical liability actions should be capped. But for 27 years, that legislative enactment has gone unheeded based on this Court's decision in *Smith v. Schulte*, 671 So.2d 1334 (Ala. 1995). In the ensuing decades, this Court has repudiated *Smith*'s reasoning. And the legislature has done nothing to repeal—either implicitly or explicitly—that statutory cap. It is long past time for the Court to correct its constitutional error and enforce the will of Alabama's citizens as reflected in Section 6-5-547.

ARGUMENT

A. The 1987 Tort Reform Measures Reflected the Popular Will of Alabama's Citizens.

ACJRC was formed in 1985 when the Governor at the time, George Wallace, requested that members of the business community form a coalition to support measures intended to restore fairness and balance to the civil justice system. The primary driver of the need for reform stemmed largely from several factors: illogical, one-sided venue

rules concerning suits involving foreign corporations; growing concerns about unregulated punitive damages; and a pronounced medical malpractice crisis, particularly involving delivery of babies in rural areas of the state where insurance carriers were refusing to extend coverage. In 1986, Governor Wallace appointed a commission, evenly divided between business and trial lawyers, but the commission deadlocked and did not issue legislative recommendations.

The Alabama Senate, during this time, extended extraordinary governing power over its body to its presiding officer, the Lt. Governor. The election in 1986 of Lt. Governor was considered by proponents and opponents of tort reform to be the pivotal driver of whether tort reform measures could achieve final passage.[1] The election of Jim Folsom to this position was supported by tort reform proponents and encouraged tort reform advocates that passage was achievable in the upcoming 1987 legislative session. In a surprising twist, a Republican was elected Governor, Guy Hunt, who also proved to be an advocate for tort reform.

[1] The long-time House Speaker at the time, Jimmy Clark, was already known to be a strong advocate for tort reform.

See generally, Robert D. Hunter, *Alabama's 1987 Tort Reform Legislation,* 18 Cumb. L. Rev. 281 (1987-1988).

Two of the nine (9) tort reform measures adopted in 1987 are relevant here: *Ala. Act No.* 87-185, a general limitation on punitive damages in civil actions, excluding wrongful death, of $250,000 (codified as *Ala. Code* §§6-11-21- 27 (1975)[2], and *Ala. Act No.* 87-189, which, among its other provisions, limited punitive damages in wrongful death actions against a health care provider based on a breach of the standard of care to $1 million, with an annual CPI adjustment (codified as *Ala. Code* §6-5-547 (1975). The passage of these, and other tort reform measures, largely changed the political and judicial landscape in Alabama for many years, as is detailed below.

B. <u>Prior Courts Engage in Judicial Overthrow of Tort Reform and Disregard Duly Enacted Laws</u>.

One of the first salvos against tort reform by its opponents arose from a fraud case involving a boat purchase and a resulting punitive damage award of $15,000 in *Armstrong v. Roger's Outdoor Sports, Inc.*,

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[2] A problematic feature of this cap were "pinholes" the principal opponent (ATLA) of the package successfully inserted, including "pattern and practice evidence of intentional wrongful conduct" which then made the cap inapplicable. Hunter, *supra,* at 299-301.

581 So.2d 414 (Ala. 1991). Applying the "no presumption of correctness" standard for review of a jury's punitive award as directed by §6-11-23(a), the trial court eliminated the punitive award. *Id.* at 415. On appeal, though acknowledging that the appellant "has not raised these sections of the Constitution as grounds for overturning the statutes," this Court held that §§6-11-23(a) and 6-11-24(a) violated the separation of powers provision preventing the legislative branch from "intruding" into the "inherent" functions of the judicial process. *Id.* at 416-421 ("the legislature, in telling the constitutionally created and constitutionally empowered trial and appellate courts that they are not to give any presumption of correctness to a jury's verdict, contradicts the very essence of a judge's power"). As a result, the decision invalidated both §6-11-23(a) and 24(a) and remanded the matter to the trial judge to evaluate the punitive award with an alleged "constitutionally guaranteed" presumption of correctness.

In quick succession following the release of *Armstrong*, the Supreme Court, utilizing not separation of powers, but equal protection and right to trial by jury grounds, invalidated the $400,000 non-economic damages cap in the Medical Liability Act, §6-5-544(b), in

Moore v. Mobile Infirmary Association, 592 So.2d 156 (Ala. 1991), the $250,000 punitive damage cap, §6-11-21, in *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993) (on right to trial by jury grounds only), and the $1 million cap on wrongful death verdicts in medical liability actions, §6-11-547, in *Smith v. Schulte*, 671 So.2d 1334 (Ala. 1995). Justices Maddox, Stegall and Houston dissented from the *Moore* and *Henderson* opinions, and Chief Justice Hooper, and Justices Maddox and Houston dissented in *Smith v. Schulte* in 1995.

The gist of these dissents, which eventually were adopted by a majority of the Court, were two-fold. First, as Justice Houston first expressed in his *Moore* dissent, the Constitution of Alabama of 1901 deleted the equal protection clause altogether, though it had appeared in the 1868 and 1875 state constitutions. The foundation for the "phantom" state equal protection clause only existed because of a mistaken reliance on *Pickett v. Matthews*, 238 Ala. 542, 192 So.2d 261 (1939), for recognition of a state equal protection provision when, in fact, that case was relying solely on the Fourteenth Amendment to the United States Constitution as the source for equal protection in

Alabama. *Smith v. Schulte*, 671 So.2d at 1348 (Houston, J. dissenting).[3] Perhaps more importantly, the intermediate level of scrutiny applied in *Moore* and *Smith v. Schulte* to invalidate these tort reform measures, "created a legal and analytical quagmire and has given this Court almost limitless discretion in striking down duly enacted laws." *Id.* at 1349. In reality, because any statutory classification in the Medical Liability Act of 1987 involved neither a "suspect class" nor abridged a "fundamental right," only a rational basis of scrutiny should be utilized to determine the constitutionality, on equal protection grounds, of the legislative caps. Thus, because the Court need only find "that the classification made by the legislature is not arbitrary or unreasonable," any "state of facts reasonably may be conceived to justify it." *Id.* at 1352.[4]

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[3] The Court in 1999 unequivocally undercut the "phantom" equal protection reasoning in *Moore* and *Smith v. Schulte*, holding the Alabama Constitution did not contain an equal protection provision. *Ex parte Melof*, 735 So. 2d 1172, 1181-86 (Ala. 1999).

[4] This, of course, was exactly the basis upon which a properly functioning Court, in *Reese v. Rankin Fite Memorial Hospital*, 403 So.2d 158 (Ala. 1981) upheld the constitutionality on equal protection grounds of a statute enacted as part of the 1975 version of the Medical Liability Act.

With respect to trial by jury grounds, used as a basis to invalidate damage caps in *Moore, Henderson*, and *Smith v. Schulte*, dissents by Justices Maddox and Houston forcefully disputed that Article I, §11 of the Alabama Constitution "freezes" substantive law such that Alabama juries have "more power and right to decide the amount of penalty to assess against a civil wrongdoer than the duly elected representatives of the people." *Henderson*, 627 So.2d at 894 (Maddox, J., dissenting).

Indeed, prior Alabama cases had interpreted the right to trial by jury, not to freeze the legislature out from enacting substantive laws governing wrongful conduct or the extent of appropriate penalties for such conduct, but to preserve "an individual's common-law right to have a jury perform its historic fact-finding function." *Goodyear Tire and Rubber Co v. Vinson*, 749 So.2d 393, 397 (Ala. 1999). As Justice Houston explained, such a holding couldn't invalidate criminal laws changed since the adoption of the 1901 Constitution, placing the judge, instead of the jury, in charge of determining the degree of punishment after the conviction of the defendant. *Henderson*, 627 So.2d at 905 (explaining that "if the legislature did not have the power to remit

penalties...then the legislature had no power to take away the jury's right to sentence a defendant for murder....").

By 1994, as a consequence of its rulings in these tort reform cases, Alabama's business community, and Alabama's citizenry, had seen enough judicial activism from the Court's majority. The momentum for change was palpable and voters, in quick succession, elected new members to the Court in elections conducted in 1994, 1996 and 1998 such that by 1999 a majority of the Court, in special concurrences, announced their willingness to overrule *Henderson v. Alabama Power* in the proper case. *See Goodyear*, 749 So.2d at 393 ("All parties...should be on notice that this Court is willing to reconsider the *Henderson* ruling that the punitive damages cap of §6-11-21, *Ala. Code* 1975, is unconstitutional") (Hooper, C.J., concurring specially). Justice Houston went further, announcing that "should this Court overrule *Henderson*, then the $250,000 cap on punitive damages...will, in my view, be revived."

As this Court knows, however, in 1999, the legislature did not intend to await an opportunity for the Court to revive the $250,000 cap. ACJRC, likewise, did not intend or wish for the Court to revive the

$250,000 cap, understanding that the "pinhole" exceptions in that original cap had proven to be interpreted by trial courts in a far more expansive fashion than originally intended. Instead, ACJRC proposed another package of comprehensive tort reform legislation, including the present day Section 6-11-21, which caps punitive damages in all civil actions, with certain exceptions, including "actions for wrongful death or for intentional infliction of physical injury."

The 1999 punitive damage cap excluded wrongful death cases just as the 1987 general punitive damage cap had done. This exclusion in 1987 and in 1999 was adopted with the full knowledge by the legislature that the medical community, proceeding on a separate but parallel track, had enacted its own series of reforms and caps to address needed reforms and damage limitations in actions against health care providers, including §6-5-547, the cap on punitive damages awarded in medical liability cases involving wrongful death. Both legislators and lawyers for proponents of the 1999 tort reform measures, including the undersigned, were acutely aware that a majority of the Court was willing to reconsider not only *Henderson*, but, by extension and logic, *Smith v. Schulte*, as well.

Thus, the legislature obviously has left wide open the possibility that the Court will overrule *Smith v. Schulte*, which should have, as Justice Houston expressed in 1999, the effect of reviving §6-5-547, and restoring, after 27 years, the legislature's judgment and prerogative to establish a maximum cap on punitive damages in wrongful death medical malpractice cases. That case is now before the Court.

C. <u>Revival is the Appropriate Course of Action</u>.

Following this Court's announcement in *Goodyear* in 1999 that it was willing to overturn prior precedent involving punitive damage caps, further development in the law from the U.S. Supreme Court concerning punitive damages even strengthened its hand further. The U.S. Supreme Court, particularly active during this time in the due process area involving punitive damages, announced in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001) that state legislatures "enjoy broad discretion in authorizing and limiting permissible punitive damages awards." This ruling followed landmark decisions from the U.S. Supreme Court recognizing and setting forth guidelines for state lawmakers or courts to follow concerning the outer limits of due process in the award of punitive damages. See *Pacific*

Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 20 n. 9 (1991) (acknowledging Alabama's adoption of §6-11-21, and implying the $250,000 cap could prevent a due process violation); *Haslip*, 499 U.S. at 39 (Scalia, J., concurring in the result) ("state legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages"; *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

This Court was, of course, well aware of these decisions and noted them in their own decisions involving awards of potentially excessive punitive damages. See *Oliver v. Towns*, 738 So.2d 798, 805 n. 7 (Ala. 1999) (review of $1.5 million award); *Horton Homes, Inc. v. Brooks*, 832 So.2d 44, 55 (Ala. 2001) (review of $600,000 award). Moreover, in a capital murder case this Court reviewed the right to trial by jury provision in light of a challenge brought to Alabama's "jury-override" statute where the jury voted by a majority for a life sentence but the trial court sentenced the defendant to death. *Ex parte Apicella*, 809 So.2d 865, 872 (Ala. 2001). In rejecting this challenge, the Court acknowledged its prior decisions in *Henderson* and *Smith v. Schulte* wrongfully stood for the proposition in civil cases that §11 of the Alabama Constitution guaranteed the right of the jury to punish and

the legislature "could not even control the extent of the punishment." In this regard, Justice Houston's majority opinion found: "[T]o the extent [*Henderson*] and [*Schulte*] restricted the legislature from removing from the jury the unbridled right to punish, *Henderson* and *Schulte* were wrongly decided." *Id.* at 874.

As discussed, some members of the Court by 1999 were already on record that, once *Henderson* was overruled, the cap in §6-11-21 would be revived. *Goodyear*, 749 So.2d at 398 (Houston, J., concurring specially). Intervening events of the legislative repeal of the $250,000 cap obviously prevented the revival of the statute, but the Court reached this same result in 2001 in *Horton Homes, supra.* There, the Court, reviewing a $600,000 punitive award, noted the U.S. Supreme Court's decision in *Cooper Industries* urged independent review of punitive damages awards by appellate courts as "de novo review tends to unify precedent and stabilize the law." *Horton Homes*, 832 So.2d at 56 (citing to *Cooper Industries*, 532 U.S. 424, 121 S. Ct. 1678, 1684-89 (2001). But the de novo review ordered by the Alabama legislature in §6-11-23(a) and 24(a) were declared unconstitutional in *Armstrong v. Rogers Outdoor Sports, Inc.* on independent state law grounds of

separation of powers. Though stricken and invalidated by *Armstrong* in 1991, by 2001 the Court declared that: "10 years later, relying on the United States Supreme Court's decision in *Cooper Industries*, this Court will begin applying the standard of review directed by the legislature in 1987." *Id.* at 57.

Similarly, the Court upheld the statutory provision in the 1987 Medical Liability Act abolishing the collateral source rule, §6-5-547, though acknowledging its generally applicable counterpart, §12-21-45, had previously been held unconstitutional in *American Legion Post No. 57 v. Leahey*, 681 So.2d 1337 (Ala. 1996). The *Marsh* court rejected the "invitation to substitute our judgment for the policy-making decision the legislature made in enacting §6-5-545" and overruled *American Legion Post No. 57* "to the extent that case held §12-21-45, *Ala. Code* 1975, unconstitutional." *Marsh v. Green*, 782 So.2d 223, 233 (Ala. 2000). By 2003, the Court began the process of sorting out issues in implementing the collateral source rule in both medical and general liability cases, and of course it is routinely applied in personal injury tort litigation today just as ordered by the Alabama legislature in 1987. *Mobile Infirmary Med. Ctr. v. Hodgen,* 884 So.2d 801, 818 (Ala. 2003);

McCormick v. Bunting, 99 So.3d 1248 (Ala. Civ. App. 2012) (rejecting trial court's reasoning that statutory abrogation of collateral source rule was superseded by Alabama Rules of Evidence); *Crocker v. Grammer,* 87 So.3d 1190, 1193 (Ala. Civ. App. 2011) (legislature modified collateral source rules to permit jury to determine whether an award of damages should be reduced by third-party payments made to health care providers).

It is true that in *Mobile Infirmary Med. Ctr. v. Hodgen* the Court declined to revive §6-5-544(b), the non-economic damages cap, which was invalidated in *Moore.* But, that declination was premised on the subsequent enactment, in 1999, "in all civil actions" of a new cap applicable to awards of punitive damages in non-wrongful death medical liability cases, not because of concerns with stare decisis. Indeed, this Court did not hesitate when overruling *American Legion* or *Armstrong* to revive the 1987 tort reform measures invalidated by erroneous decisions from an earlier Court: "when the Constitution is misinterpreted, the doctrine of stare decisis is not entitled to the deference it otherwise receives." *Marsh v. Green,* 782 So.2d at 232 (citing to *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 63 (1996)),

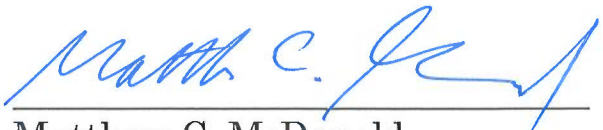
for the proposition that constitutional cases warrant reconsideration despite stare decisis since "correction through legislative action is practically impossible.").

CONCLUSION

In 1995, in overruling the punitive damage cap established by the legislature in §6-5-547, a majority of the Court substituted its judgment for the judgment of the legislature. The Court has repeatedly, since that time, acknowledged that *Smith v. Schulte* was erroneously decided and misinterpreted the Alabama Constitution. This case presents the opportunity to set this matter right and to restore the will of the people as expressed through their legislative representatives. This can only be accomplished by expressly overruling *Smith v. Schulte* and reviving the punitive damages cap established by the legislature in 1987, with its CPI adjustment appropriately computed.

ACJRC respectfully requests this Court, should it not reverse or remand the case for a new trial, reduce the verdict in accordance with the legislative mandate in §6-5-547.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(d) of the Alabama Rules of Appellate Procedure, I hereby certify that this brief complies with the word limitation of Rule 28(j)(1) of the Alabama Rules of Appellate Procedure. This brief contains **3,283** words, excluding the parts of the brief exempted by Rule 28(j)(1) and Rule 32(c) of the Alabama Rules of Appellate Procedure.

This brief complies with the font and type style requirements of Rule 32(a)(7) of the Alabama Rules of Appellate Procedure because this brief has been prepared using Microsoft Word in Century schoolbook, font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2022, I electronically filed the foregoing brief and served the following by electronic mail and/or United States Mail to their regular mailing addresses:

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